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5 **UNITED STATES DISTRICT COURT**  
6 **SOUTHERN DISTRICT OF CALIFORNIA**  
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8 UNITED STATES OF AMERICA,  
9 Plaintiff/ Respondent,  
10 v.  
11 PHILLIP HOTCHKISS,  
12 Defendant/ Petitioner.

CASE NO. 14cr198 WQH  
CASE NO. 16cv1481 WQH

**ORDER**

13 HAYES, Judge:

14 The matter before the Court is the motion for reconsideration filed by the Plaintiff  
15 United States of America (ECF No. 52).

16 On September 13, 2016, this Court filed an order granting the motion to vacate  
17 sentence pursuant to 28 U.S.C. § 2255 filed by Defendant/Petitioner. Defendant  
18 asserted that his sentence should be vacated in light of *Johnson v. United States*, 135,  
19 S.Ct. 2551(2015). Defendant asserted that the conclusion at the time of his sentencing  
20 that CPC §148.10(a) qualified as a “crime of violence” pursuant to the residual clause  
21 in U.S.S.G. § 4B1.2(a)(2) denied him due process of law on the grounds that the  
22 Supreme Court in *Johnson* determined that the identically-worded residual clause of the  
23 Armed Career Criminal Act was unconstitutionally vague. The Court determined that  
24 “*Johnson* nullifies the identically worded residual clause in § 4B1.2(a)(2)” and that  
25 “Hotchkiss’s sentence was increased pursuant to a provision in the guidelines that is  
26 unconstitutionally vague.” (ECF No. 51 at 5).

27 Plaintiff United States moves the Court for reconsideration of the order granting  
28 habeas relief on the grounds that the Court incorrectly concluded that the United States

1 conceded that the holding in *Johnson* applies retroactively in the guideline context.  
 2 Defendant agrees that the United States did not concede this position but contends that  
 3 the Court of Appeals for the Ninth Circuit has determined that a rule deemed  
 4 “substantive” for the purposes of the Armed Career Criminal Act is “substantive” for  
 5 the purposes of the Sentencing Guidelines.

### 6 **RULING OF THE COURT**

7 The Court incorrectly stated that the Plaintiff United States conceded in this case  
 8 that the holding announced in *Johnson* applies retroactively in the guideline context.  
 9 The Court now addresses this issue and concludes that retroactive relief should be  
 10 granted in this case.

11 In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court held  
 12 that newly announced constitutional rules apply to all criminal cases still on direct  
 13 review but apply retroactively on collateral review if the rule (1) “places certain kinds  
 14 of primary, private individual conduct beyond the power of the criminal law-making  
 15 authority to proscribe” or (2) is a “watershed rule [] of criminal procedure.” *Id.* at 304,  
 16 311 (internal quotation marks omitted). In *Welch v. United States*, 136 S.Ct. 1257  
 17 (2016), the Supreme Court held that *Johnson* is a new substantive rule because the rule  
 18 “changed the substantive reach of the Armed Career Criminal Act, altering the ‘range  
 19 of conduct or the class of persons that the [Act] punishes.’” *Id.* at 1265 (quoting *Schriro*  
 20 *v. Summerlin*, 542 U.S. 348, 353 (2004)).

21 In *Reina-Rodriguez v. United States*, 655 F.3d 1182 (9th Cir. 2011), the Court of  
 22 Appeals determined that a prior decision<sup>1</sup> which “altered the conduct that substantively  
 23 qualifies as burglary under the categorical approach” for the purposes of the ACCA  
 24 created a substantive rule eligible for retroactive application under *Teague*. *Id.* at 1189.  
 25 (“Because *Grisel* announced a substantive rule, rather than a procedural one, *Teague*  
 26 does not bar retroactive application of *Grisel*.”). The Court of Appeals applied the prior

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 28 <sup>1</sup> *United States v. Grisel*, 488 F.3d 844 (9th Cir 2007).

1 decision retroactively to Reina-Rodriguez's challenge to his Guideline enhancement  
 2 based on the § 4B1.2 definition of crime of violence and reversed the denial of habeas  
 3 relief by the district court. *Id.* at 1189-90.

4 *Johnson* substantively changes the conduct by which federal courts may enhance  
 5 the sentence of a defendant under the Guidelines. Applying the holding in *Johnson*,  
 6 Defendant's prior state court conviction for resisting a peace officer causing injury in  
 7 violation of CPC § 148.10(a) is no longer a "crime of violence" for the purposes of  
 8 U.S.S.G. § 2K2.1(a)(4)(A). While the Guidelines are advisory, the Guidelines remain  
 9 the "lodestar of sentencing." *Peugh v. United States*, 133 S.Ct. 2072, 2084 (2103).  
 10 Consistent with *Reina-Rodriguez*, the Court concludes that the *Teague* bar does not  
 11 apply and that the ruling in *Johnson* should be applied retroactively to Defendant's  
 12 petition. *See Johnson*, 135 S.Ct. at 2557 ("Increasing defendant's sentence under the  
 13 [identically-worded residual clause] clause denies due process."). *See United States*  
 14 *v. Dean*, 2016 WL 1060229 (D.Or. March 25, 2016) (applying *Johnson* retroactively  
 15 to career offender Guidelines based upon *Reina-Rodriguez*), *United States v. Bercier*,  
 16 2016 WL 3619638 (E.D. Wash. June 24, 2016) (based upon *Reina-Rodriguez*, "the  
 17 Court is bound to conclude that *Johnson* applies retroactively to the Sentencing  
 18 Guidelines."), *Gilbert v. United States*, 2016 WL 3443898 (W.D. Wash. June 23, 2016)  
 19 (same granting habeas relief), *United States v. Stamps*, 2016 WL 3747286 (N.D. Cal.  
 20 June 29, 2016) (same granting habeas relief). Because Defendant was sentenced  
 21 applying an unconstitutional sentencing enhancement, the Court affirms its prior order  
 22 that Defendant is entitled to habeas relief under 28 U.S.C. § 2255.

23 IT IS HEREBY ORDERED that the motion for reconsideration filed by the  
 24 Plaintiff United States of America (ECF No. 52) is denied.

25 DATED: September 28, 2016

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 27 **WILLIAM Q. HAYES**  
 28 United States District Judge